IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1943

No. 99

ILLINOIS STEEL COMPANY,

Petitioner,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

REPLY BRIEF FOR PETITIONER.

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SUBJECT INDEX.

TABLE OF CASES CITED.

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I.

Opinion Below.

The opinion of the Appellate Court on rehearing (R. 38-56) is reported in 316 Ill. App. 516 and 46 N.E. 2d 144.

II.

Concise Statement of the Grounds on which Jurisdiction of this Court is Invoked.

Jurisdiction of this Court is invoked in accordance with the provisions of Section 237(b) and 240(a) of the Judicial Code, as amended (28 USCA 344, 350).

III.

Statement of the Case.

Respondent's statement of the case does not contain all that is material to the consideration of the questions presented.

For that reason, it is deemed necessary to correct an inaccuracy in the statement of the case set forth in the brief of the respondent on page 4 as follows:

> "The only question in this case is whether the provisions of Section 7 release petitioner (consignor) from liability for the additional freight charges admittedly due on the said shipments in the face of petitioner's express undertaking as to each shipment that the lawful freight charges thereon were to be prepaid by petitioner."

The "only question" is an oversimplification of the issues.

Questions presented by the issues in this case are set forth by petitioner in its petition for a writ of certiorari heretofore filed with this Court and are as follows:

1. Whether the purpose of the "no recourse" clause in uniform bills of lading is to protect the consignor from liability for charges known or unknown, including subsequently discovered undercharges or additional charges, when a delivering carrier makes delivery without requiring the payment of such charges, contrary to the stipulation in the bill of lading.

2. Whether a delivering carrier, contrary to the provisions of the "no recourse" clause parts with the possession of the property shipped without collecting from the consignee all charges due, may collect subsequently dis-

covered undercharges or additional charges from the consignor who shipped "prepaid" or whether the delivering carrier must look for payment solely to the consignee.

3. Whether a carrier in making a delivery to the consignee without requiring payment of charges subsequently discovered to be due on shipments prepaid by the consignor under "no recourse" bills of lading, which provide in part that the consignor "shall not be liable for such charges," may, notwithstanding the provisions of a "no recourse" clause in bills of lading, collect subsequently discovered undercharges or additional charges from the consignor.

4. Whether, under such circumstances, if the delivering carrier knows or should have known that it was not making deliveries required by the export tariff under which the consignor directed prepaid shipments to be made, the carrier's only remedy for additional charges resulting from diverted deliveries is against the consignee who knows or should have known of the diversions or, in addition, against the consignor.

5. Whether part payment of all charges to the initial carrier before shipments began moving for export under "no recourse" bills of lading stamped prepaid, render the consignor, or the consignee alone, liable to the delivering carrier for the balance of charges discovered by the delivering carrier to be due after delivery.

6. Whether, under such circumstances, the rule of the Appellate Court that the consignor is liable shall prevail or whether there shall prevail the rule of the Federal Courts that the consignor is not liable and the delivering carrier must look solely to the consignee.

Furthermore, "petitioner's express undertaking as to each shipment that the lawful freight charges thereon were to be prepaid by petitioner", stated by the respond-

ent in its brief on page 4 to be part of "the only question in this case" is argumentative.

Section 7 of the uniform straight bills of lading in part provided:

> "The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor . . . shall not be liable for such charges." (R. 14).

This language requires examination of the face of the bill of lading to ascertain what the consignor stipulated by signature. The stipulation of facts signed by the parties leaves no doubt on this point. It in part provided (R. 13):

> That each of the bills of lading covering the shipments contained the following provision, signed by the defendant by one of its authorized employees:
>
> "If this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:
>
> "The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges. (See Section 7 of conditions.)
>
> Illinois Steel Company, Per.....
> (Signature of consignor)."

The face of each bill of lading provided also that each shipment was for export, sometimes indicating that the shipment was for loading on a vessel sailing from Balti-

more, Maryland on specified dates (R. 13). Each bill of lading, among other things (R. 13), specified:

"Consigned to Standard Wholesale Phosphate & Acid Works, Inc.

Destination—Curtis Bay—Baltimore, State of Maryland.

Route—EJ&E, Curtis, B&O—for export—

Freight rate—Prepaid 28¢ per 100# to Baltimore.

Switching rate—none.

J.L.—destination N.A. 5 for export to Porto Rico. Must go through to coast without transfer on account of liability of damage to contents consisting of sulphate of ammonia for fertilizer purposes."

The face of each bill of lading also contained the following (R. 13):

"If charges are to be prepaid, write or stamp here 'To be Prepaid'."

The words "To be Prepaid" were inserted by the consignor in the space provided at the time of the making of each such bill of lading (R. 13).

IV.

Specification of Assigned Errors Intended to be Urged.

The Appellate Court erred:

1. In construing that part of Section 7 (the "no recourse" clause) of the uniform straight bills of lading, approved by the Interstate Commerce Commission and executed by your petitioner on each shipment, which provided:

"Sec. 7. * * * The consignor shall be liable for the freight and all other lawful charges, except that if

> the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges. * * *'' (R. 14)

so as to render liable your petitioner as consignor, notwithstanding the fact that your petitioner stipulated, by signature, in the space provided for that purpose on the face of each of the bills of lading that the carrier shall not make delivery without requiring payment of the freight and all other lawful charges (R. 13) and the fact that the carrier made delivery of the shipments without requiring payment of the charges subsequently discovered or found to be due.

2. In holding that the "no recourse" clause was not applicable to the situation covered by the stipulation of facts.

3. In holding that the "no recourse" clause was inapplicable to prepaid shipments.

4. In reversing the judgment of the trial court and remanding the case to the trial court with directions to enter judgment for the plaintiff and against your petitioner in the sum of $3,675.52 and costs.

V.

SUMMARY OF ARGUMENT.

The history of Section 7 before the Interstate Commerce Commission clearly indicates that *after delivery* of the shipment, the "no recourse" clause exempts the consignor

from liability for freight and all other lawful charges. The right of the carrier to require prepayment or guarantee of its charges was contained in the first uniform domestic straight bill of lading prescribed by the Commission and was not considered by the carriers, the shippers or the Commission as obscuring the limitation upon the liability of the consignor resulting from the "no recourse" clause, if the carriers, contrary to the stipulation, made delivery of the shipment without obtaining payment of the freight and all lawful charges.

The mere placing of the words "To be Prepaid" on the face of each bill of lading by the consignor does not make a "contract" between the consignor and the carrier for the consignor to pay *all lawful charges*, if the consignor signs the "no recourse" clause and the carrier violates that clause and makes delivery of the shipment.

The respondent knew or should have known that it was not making deliveries required by the export tariff under which the consignor directed the prepaid shipments be made. The responsibility of the carrier moving an export shipment is a *continuing responsibility*, imposing a duty upon the carrier to know the provisions of the export tariff, especially when the carrier has notice it is a prepaid "no recourse" shipment. If the prepaid "no recourse" shipments are delivered and the carrier later discovers the export rates were not applicable, the consignor is not liable for the balance of the charges due.

Each bill of lading in the case at bar was a receipt for the amount of the freight prepaid computed in accordance with the rate set forth on the face of each bill of lading. Thus, each bill of lading was a receipt for prepayment of part of the charges. This part prepayment renders the "no recourse" clause applicable and protects the consignor from liability for the balance of the charges due.

VI.

ARGUMENT.

A.

The history of Section 7 before the Interstate Commerce Commission clearly indicates the "no recourse" clause exempts the consignor from liability for freight and all other lawful charges, after delivery of the shipment, notwithstanding the right of the carrier to require prepayment or guarantee of the charges.

In 1919 when the Interstate Commerce Commission first prescribed a uniform domestic straight bill of lading for use by common carriers, (*In the Matter of Bills of Lading*, 52 I.C.C. 671, 741, Appendix B), Section 7 read as follows:

> "The owner or consignee shall pay the freight and average, if any, and all other lawful charges accrued on said property, and, if required, shall pay the same before delivery. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor shall not be liable for such charges. Nothing herein shall limit the right of the carrier to require at the time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped."

Both the shippers and the carriers were in agreement upon the phraseology of this section, except that the shippers proposed that there be inserted in the bill immediately following the words "face of this bill of lading" the additional words "or in a written order of reconsignment." The carriers objected to this proposal. The Commission sustained the objection. The Commission (*In the Matter of Bills of Lading,* 52 I.C.C. 671, 721) stated:

> "A primary right of the carrier in the conduct of its business is that of reasonable compensation for the service rendered by it, and it is entitled to assure itself of such compensation by demanding it in advance. In ordinary commercial practice, however, the carrier waives its right to prepayment of charges and looks to the consignee for the same, its claim being secured by a lien upon the goods. There is a presumption, when goods are transported without exaction of charges in advance, that the consignee is liable for the same as the owner of the goods and that the carrier may look to him for payment. This, however, is a rebuttable presumption. The consignor, being the one with whom the contract of transportation is made, is originally liable for the carrier's charges and unless he is specifically exempted by the provisions of the bill of lading, or unless the goods are received and transported under such circumstances as to clearly indicate an exemption for him, the carrier is entitled to look to the consignor for his charges. In order to secure exemption from liability for the freight charges in case the shipment is delivered to the consignee without the collection of such charges, the consignor is required to append his signature to the following statement in a space on the face of the bill of lading provided for that purpose: 'The carrier shall not make delivery of this shipment without payment of freight and other lawful charges.'"

Thus, notwithstanding the language in Section 7 that "Nothing herein shall limit the right of the carrier to require at the time of shipment the prepayment or guarantee of the charges," the Commission in prescribing the language for Section 7 recognized that the consignor secured "exemption from liability" for the "freight and all other lawful charges" if the consignor signed the statement on the face of the bill of lading (R. 13) provided for that purpose:

> "The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges."

The carriers acquiesced in the consignor's "exemption from liability" for "freight and all other lawful charges" by the consignor's stipulation on the face of the bill. When, however, the shippers desired to extend this exemption from liability to a similar stipulation "in a written order of reconsignment," the Commission (p. 722) stated:

> "It is further urged that to omit a provision of this kind from the bill of lading will prevent the shippers enjoying a large measure of the protection carried by Section 7 against bills for overcharges or for freight charges not paid by parties who at the time the freight was received were amply able to pay the charges thereon."

The Commission recognized that the exemption from *liability* intended by Section 7 and the signing by the consignor of the stipulation on the face of the bill were for the purpose of protecting the consignor "against bills for overcharges or for freight charges not paid" by the consignee.

The carriers objected to the addition of the phrase "or in a written order of reconsignment" to Section 7 for the

reasons, among others, (*In the Matter of Bills of Lading*, 52 I.C.C. 671, 722) that:

> "a carrier, touching the important matter of the payment and collection of freight charges—a matter which relates to the paramount purpose of the act to regulate commerce itself—should be permitted to rely upon the bill of lading issued when the transaction is initiated, and not compelled to observe instructions which would often be hastily and inaccurately transmitted while the shipment is en route. In the third place, it is much easier for a consignor to take the onus at the outset of determining whether he will assume and continue to bear the common-law liability for the payment of the freight charges, or the qualified liability which will accrue under the provision conceded by the carriers, than it is for a carrier to guard against the consequences of having an attempt made to change the liability status while the shipment is being transported."

The carriers recognized, also, that the carrier should "rely upon the bill of lading issued when the transaction is initiated" and that the consignor should take "the onus at the outset of determining" whether it would "assume and continue to bear the common-law liability for the payment of the freight charges" or whether it would assume only "qualified liability" by stipulating on the face of the bill that "The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges," which qualified liability was "conceded by the carriers" to exempt the consignor from the payment of freight and all other lawful charges.

In 1921 the Interstate Commerce Commission (*In the Matter of Bills of Lading*, 64 I.C.C. 357, 364, Appendix D) revised the prescribed form of the uniform domestic

straight bill of lading so that Section 7 was approved to read as follows:

> "Except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor shall not be liable for such charges. Nothing herein shall limit the right of the carrier to require at the time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped."

The western carriers objected (p. 360) to the language in Section 7 "relieving consignor from liability for freight charges." The Commission overruled this objection and made no change in the exemption of the consignor from liability for the payment of freight and all other lawful charges, if the consignor so stipulated in the manner prescribed by Section 7.

In 1922 the language of Section 7 was again modified by the Commission (*In the Matter of Bills of Lading*, 66 I.C.C. 63, 64) so as to make the first sentence read:

> The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where

it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid.

The remainder of Section 7 contained the same language prescribed by the Commission in 1919.

The carriers urged this modification in order to eliminate doubt as to the liability of the consignee for charges accruing on shipments consigned and stated in part (p. 64) the following reasons:

1. It is well-settled law that a consignee accepting delivery of a shipment becomes liable for the charges lawfully accruing thereon.

2. The carrier could not contract with the consignee to relieve the latter of this liability.

3. The bills of lading heretofore in use have carried the provision that the consignee shall be liable for charges, and its omission might render it difficult for carriers to collect their lawful charges.

4. The provision making the consignee liable for charges was not objected to at the hearings, but was agreed upon by all parties.

5. There is no evidence which would warrant the Commission in striking out the provision in the bills now in use.

6. There is no conflict between the proposed modification and the provision of Section 3 of the interstate commerce act.

Although the Interstate Commerce Commission has recognized that a carrier may relieve a consignor from liability for the payment of freight and all other lawful charges if the consignor so stipulates on the face of the bill

of lading (*In the Matter of Bills of Lading*, 52 I.C.C. 671, 721), the Commission also has recognized that the carrier may not contract with the consignee to relieve him from this liability.

The statement: "Nothing herein shall limit the right of the carrier to require at the time of shipment the prepayment or guarantee of the charges" was contained in Section 7 during all of these deliberations by the Interstate Commerce Commission. The statement, however, played no part whatsoever in the reasoning of the Commission with respect to the exemption from *liability* for the payment of "the freight and all other lawful charges" by the consignor if the consignor so stipulated, by signature, on the face of the bill of lading.

That the consignor may exempt itself from liability for the payment of freight and all other lawful charges was recognized by this Court in the case of *L. & N. R.R.* v. *Central Iron Co.*, 265 U.S. 59, wherein Mr. Justice Brandeis, writing the opinion for the Court, stated in the footnote on page 66, in part:

> "This ruling, which was adopted May 1, 1911, and 'interpreted' May 4, 1918, was amended, on March 6, 1922, by calling attention to the provision inserted in the Uniform Domestic Bill of Lading prescribed October 21, 1921. By that provision the consignor may (see Section 7 of Conditions and clause on face of bill) relieve himself of all liability for freight charges. *In the Matter of Bills of Lading*, 52 I.C.C. 671, 721; 64 I.C.C. 347, *ibid*, 357; 66 I.C.C. 63."

The petitioner does not contend that the "no recourse" clause on prepaid shipments (or on shipments not prepaid) exempts the consignor from all liability. The language of the clause and of Section 7 clearly provide otherwise. The exemption of the consignor from liability

for payment of the freight and all other charges is a limited exemption. It applies only when the delivering carrier has made *delivery* of the shipment without having received payment of the freight and all other lawful charges. Before delivery, the exemption does not apply. The carrier then has all of its rights against the consignor which it would have had if the "no recourse" clause had not been executed. In the case at bar, however, delivery had been made by the respondent without the payment of freight, contrary to the stipulation on the face of each bill, and, therefore, the "no recourse" clause applies.

B.

The mere placing of the words "To be Prepaid" on the face of each bill of lading by the consignor does not make a contract for the consignor to pay "all lawful charges," if the consignor signs the "no recourse" clause and the carrier makes delivery of the shipment, contrary to the stipulation on the face of the bill of lading.

The law is well settled that a consignee cannot accept delivery without incurring liability for the carrier's charges, known or unknown, or discovered subsequent to delivery, whether those charges were supposed to have been prepaid or otherwise, and whether they were demanded at the time of delivery or later. (*Pittsburgh, C., C. & St. L. Ry. Co.* v. *Fink*, 250 U. S. 577.) Nevertheless, in the absence of a covering tariff provision, delivery of goods for shipment does not necessarily import an obligation of the consignor to pay the freight charges, and the carrier and the consignor are free to contract as to when and by whom payment shall be made. (*Louisville & Nashville R. R. Co.* v. *Central Iron Co.*, 265 U. S. 59.)

In the case at bar, the carrier and the consignor did contract by whom payment of the freight and all other lawful charges shall be made. They contracted also that the consignor shall not be liable for the charges in the event that the carrier made delivery of the shipments to the consignee without the payment of freight and all other lawful charges.

The respondent claims (Brief, pp. 5, 7, 8) that the consignor expressly contracted to pay *all of the freight charges* on each of the shipments in question. This the petitioner denies. The petitioner merely promised to pay *the amount* which each bill in the case at bar recited on its face: "Freight rate—Prepaid 28¢ per 100# to Baltimore." (R. 13).

"To be Prepaid" was inserted by the consignor in the space therefor at the time of making of each bill of lading (R. 13). It does not follow, however, as respondent concludes, that "petitioner expressly contracted to prepay the freight charges." Petitioner merely promised to prepay "28¢ per 100# to Baltimore" and, by the execution of the "no recourse" clause, exempted itself from liability as to any other charges.

Although the carrier had the "right" to require prepayment or guarantee of the charges, one question is whether the carrier properly exercised it in this case. In any event, and assuming that this "right" was exercised, qualifying this "right" of the carrier, is the "right" of the consignor by Section 7 and the "no recourse" clause on the face of the bill to exempt itself from *liability* for the freight and all other lawful charges if the carrier makes delivery of the shipment.

It is clear that the consignor exercised that "right". It signed the stipulation on the face of each bill of lading that "The carrier shall not make delivery of this shipment

without payment of freight and all other lawful charges." (R. 13).

The issue is whether the consignor, after delivery of the shipment, has an exemption from *liability* for the payment of freight and all other lawful charges. The "right" of the carrier to require "prepayment or guarantee of the charges" is not in issue because the carrier did not exercise that right in such manner as to overcome the clear and unequivocal language of the "no recourse" provision, that is, in such manner as to impose liability on the consignor apart from the bills, by the provisions of a guaranty or surety bond.

The mere placing of the words "To be Prepaid" on the face of each bill of lading by the consignor does not amount to a promise to pay more than "Freight rate—Prepaid 28¢ per 100# to Baltimore" (*Chicago Great Western R. R. Co. v. Hopkins, et al.*, 48 F. Supp. 60, 62), nor does it create *liability* on the part of the consignor to pay lawful charges discovered to be due *after delivery*. When the carrier made delivery and thereby surrendered its lien upon each shipment, then each delivery was made "to the consignee without recourse on the consignor."

Under ordinary circumstances, the recitation of the freight rate on the face of the bill of lading and the prepayment thereof by the consignor satisfies the "right" of the carrier to require prepayment or guarantee of the charges. The very purpose of the "no recourse" clause in bills of lading is to protect the consignor, *after delivery*, against liability for all unforeseeable lawful charges, even those which may not be discovered by the carrier until after delivery. If, however, *after delivery* of prepaid shipments under "no recourse" bills, the carrier desires to have the liability of the consignor, in addition to that of the consignee, to protect itself against unusual situations (for example, erroneous application of the tariff due to the

method in which the consignee handled the shipment after delivery, as in the case at bar, demurrage charges unknown to the carrier at the time of the delivery, reconsignment charges accruing at the direction of the consignee unknown to the carrier at the time of the delivery, insolvency or bankruptcy of the consignee unknown to the carrier at the time of the delivery, switching charges directed by the consignee and not computed by the carrier at the time of the delivery, and refrigeration charges directed by the consignee and not computed by the carrier at the time of the delivery), the carrier may exercise its "right" of prepayment or guarantee by requiring from the consignor some form of guaranty or a surety bond guaranteeing the payment of all lawful charges. This the carrier did not do in the case at bar.

Guaranty or surety bonds filed by consignors on prepaid shipments have been filed with carriers. General Order No. 25, issued by the Director General of Railroads, among other things (*Ex Parte* No. 73, 57 I. C. C. 591, 593, June 4, 1920) provided:

> "Effective July 1, 1918 [subsequently changed to August 1, 1918], the collection of transportation charges, by carriers under Federal control, for services rendered, shall be on a cash basis, and, effective as of that date, credit accommodations then in existence which may be in conflict with the following regulations shall be cancelled.
>
> "In cases where the enforcement of this rule, with respect to freight, will retard prompt forwarding or delivery of the freight or the prompt release of equipment or station facilities, carriers will be permitted to extend credit for a period of not exceeding forty-eight (48) hours after receipt for shipment of a consignment if it be prepaid, or after delivery at destination if it be a collect consignment, provided the con-

signor if it be a prepaid consignment, or the consignee if it be collect, file a surety bond either individual or corporate, in an amount satisfactory to the Treasurer of the carrier."

The fact that after delivery, Section 7 and the "no recourse" clause exempt the consignor from liability for the payment of freight and all other lawful charges, clearly indicates an expressed intention of the parties that exemption from liability shall prevail, notwithstanding the fact that the carrier has the right to demand prepayment or guarantee of its charges. But the mere "right" to demand prepayment or guarantee does not make a "contract" with the consignor to pay the carrier "all lawful charges," even though the bills are marked "To Be Prepaid," if the carrier *makes delivery* of the shipment without payment of the "lawful charges," contrary to the stipulation on the face of the bill of lading.

The decision of the Appellate Court in the case at bar was not rendered on rehearing in response to a petition based upon the decision in *Chicago Great Western Railway Co.* v. *Hopkins, et al.*, 48 F. Supp. 60, as stated by respondent on pages 11 and 15 of its brief. The order of the Appellate Court granting rehearing was entered September 18, 1942 (R. 36). The *Hopkins* case was decided November 10, 1942.

The decision of the *Hopkins* case is contrary to the decision of the Appellate Court. The petitioner contends that the *Hopkins* case was correctly decided. The District Court (p. 61) stated:

> "It is clear that the shipper may, by contract with the carrier, absolve himself from any liability for freight charges, whether such charges are those which are initially computed or by way of an undercharge, sub-

ject to the rule which prohibits discrimination. That is, the law is satisfied if someone is made liable for the freight charges, and if the consignee is made solely responsible therefor under the contract, the law is not contravened. *Louisville & Nashville R. Co.* v. *Central Iron Co.*, 265 U. S. 59, 44 S. Ct. 441, 68 L. Ed. 900; *In the Matter of Transportation of Company Material*, 22 I. C. C. 439; *In the Matter of Bills of Lading*, 52 I. C. C. 671-721; *New York Central R. Co.* v. *Trans-Amer. Petr. Corp.*, 7 Cir., 108 F. 2d 994, 129 A. L. R. 206; *New York Central R. Co.* v. *Little-Jones Coal Co.*, D. C., 25 F. Supp. 337; *Lowden* v. *Iroquois Coal Co.*, D. C., 18 F. Supp. 923.

"Upon delivery to, and acceptance by, the consignee of a shipment under a 'no recourse clause' in the bill of lading the carrier agrees to look to the consignee for any and all charges remaining unpaid and the consignee in accepting such shipment carried in pursuance of such bill of lading, agrees to pay any and all lawful charges."

The Court (p. 62) further stated:

"It is common knowledge that undercharges frequently arise in freight transportation by reason of many conditions and circumstances. It does not appear from the stipulated facts whether the defendants were the owners of the freight which was shipped. In any event, they agreed to prepay the freight in accordance with the computation noted on the bill of lading. Presumably, both parties assumed that such prepayment was a payment of all lawful charges. But at the same time the defendant consignors stipulated with the carrier that the delivery to the consignee would be without recourse on them. In other words, it is fair to assume that the parties intended that any lawful charges in addition to those paid must be collected from the consignee if delivery was accepted by such con-

signee under the contract which the consignor and the carrier had entered into. This interpretation of the agreement between the parties seems eminently fair and reasonable. Certainly, the situation herein will not warrant a finding that the parties indulged in a futile and aimless thing when they entered into the 'no recourse clause.' It is reasonable to believe that they did so for some purpose, and the purpose as herein indicated and construed is entirely consistent and compatible with the prepayment of the freight charges as computed by the parties. This construction squares not only with the apparent intent of the parties, but does not violate the rights of the consignee. The latter, upon receipt of the freight, was informed that there would be no recourse on the consignor for any freight charges or other lawful charges in addition to that which had been paid. The consignee therefore accepted the shipment with knowledge that he alone must respond for any deficiency in the freight charges. *Pittsburgh, C., C. & St. L. Ry. Co. v. Fink, supra.* [250 U. S. 577.] It is my opinion, therefore, that the 'no recourse' contract entered into between the consignors and the carrier discharges the consignors from any claim of undercharges after the shipment has been received and accepted by the consignee under the uniform bill of lading as executed herein."

Both the opinion of the Appellate Court (R. 53, 54) and the brief of the respondent (pp. 12, 13) place emphasis on that provision in the stipulation of facts which stated that at the time of making each shipment the Elgin, Joliet and Eastern Railway Company *demanded* freight thereon in the amount set forth under the heading "amounts paid by defendant" in Exhibit "A" (R. 15, 3), and that the consignor prepaid said amounts as required by the bills of lading (R. 15). These provisions in the stipulation of facts mean merely that the "Freight rate—Prepaid at 28¢

per 100# to Baltimore" (R. 13) was *payable on demand* of the initial carrier and, when billed for payment, was prepaid by the consignor. No *innuendo* should be attached to the facts stipulated that the initial carrier "demanded freight". No legal consequences result from such facts.

The Appellate Court in its opinion (R. 53, 54) construes this demand to mean "The initial carrier insisted on the payment of the charges." This statement is not correct. The initial carrier merely insisted upon payment of the amount of 28¢ per 100#.

The argument of the respondent (brief p. 8) and the opinion of the Appellate Court (R. 51) that the "no recourse" clause applies only to "collect" shipments finds no support in the history of Section 7 before the Interstate Commerce Commission. Furthermore, it finds no support from the language of Section 7, the "no recourse" clause itself or any other statement in the bills of lading.

The case of *Chesapeake & Ohio Ry. Co.* v. *Glogora Coal Co.*, 113 W. Va. 796, 169 S. E. 471, cited by respondent on page 18 of its brief is not in point because the tariff applicable to the shipments in that case expressly provided that freight charges be prepaid.

The case of *New York Central R. Co.* v. *Union Oil Co.*, 53 F. 2d 1066, is not in point because "the consignor was also consignee." As heretofore stated, the carrier may not contract with the consignee to relieve the consignee from liability for freight charges.

C.

The respondent knew or should have known that it was not making deliveries required by the export tariff under which the consignor directed the prepaid shipments to be made. The responsibility of the carrier moving an export shipment is a continuing responsibility imposing a duty upon the carrier to know the provisions of the export tariff for the purpose of obtaining compliance therewith and requiring proof of exportation.

The respondent argues (brief p. 10) and the Appellate Court agrees (R. 55) that the carrier could not be expected to foresee that additional charges would become payable because of the consignee's handling of the shipments contrary to the tariff requirements as to the application of the export rate.

Again, the respondent's brief on page 19 states that there is no foundation for the argument that respondent knew or should have known at the time of deliveries that the export rate was not applicable. The petitioner contends

(1) That the same set of facts which resulted in notice to the carrier so as to render the export rate inapplicable should have been known to the carrier within a reasonable time after August 1929, the date of the first delivery (R. 3).

(2) That the responsibility of a delivering carrier to assure itself that the export rate is applicable to a particular shipment is a *continuing responsibility*, especially when the carrier has notice it is a prepaid "no recourse" shipment.

(3) That it is the duty of the delivering carrier under all export tariffs to know what the export tariffs provide, in order that the carrier might assure itself that the export rate and not the domestic rate was applicable to the shipment.

(4) That the delivering carrier should require proof of exportation, and compliance with the export tariff, and

(5) That if the prepaid shipments move under "no recourse" bills and the delivering carrier discovers after deliveries extending over a period of years that the export rate was not applicable, the consignor is not liable for the balance of the charges due.

D.

Part prepayment of the charges to the initial carrier rendered effective the "no recourse" clause and, after delivery, protected the consignor from liability for the balance of the charges.

The entire argument of the respondent and the opinion of the Appellate Court are based upon the premise that "To be Prepaid" inserted by the consignor on the face of the bill makes a contract to prepay *all of the lawful charges*. In point B, we argued that this premise is untenable because the consignor promised to prepay only the freight in accordance with the computation on the face of the bill. That amount was prepaid by the consignor.

Each bill served "both as a receipt and as a contract." (*Louisville & Nashville Railroad Company* v. *Central Iron & Coal Company*, 265 U. S. 59, 67). Insofar as each bill was a "receipt," signed by the agent of the initial carrier (R. 13), it was a receipt for prepayment of *part* of the charges.

The Appellate Court stated (R. 54):

> "In a case where the railroad company accepted part payment of the charges and the shipper signed the 'no recourse' stipulation, we are of the opinion that this stipulation would be effective to protect the shipper as to the balance of the charges."

The same conclusion was made in *Chicago Great Western Ry. Co.* v. *Hopkins, et al.*, 48 F. Supp. 60, 62.

The prepayment of freight—28¢ per 100# to Baltimore—was in fact a part payment of all of the charges. This part prepayment, even under the decision of the Appellate Court, renders the "no recourse" clause applicable and protects the consignor from liability.

CONCLUSION.

The judgment of the Appellate Court in the case at bar should be reversed. This Court should effectuate the expressed intentions of carriers, shippers and the Interstate Commerce Commission when Section 7 and the "no recourse" clause were first prescribed by the Commission by finding that prepaid "no recourse" shipments protect the consignor from liability for all lawful charges when the carrier, contrary to the stipulation on the face of the bill of lading, makes delivery to the consignee without payment of the charges.

Respectfully submitted,

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